

Resource H: Consumer Concerns for Older Americans*

*Developed by the National Consumer Law Center (www.consumerlaw.org)

Home Improvement Scams Alert

Many low-income elderly homeowners are targeted by scam artists who use high-pressure tactics to sell unneeded and overpriced contracts for "home improvements." Often these scam artists charge more than their quoted prices or their work does not live up to their promises. When the senior refuses to pay for shoddy or incomplete work, the contractor or an affiliated lender threatens foreclosure on the senior's home. In an effort to fight such scams, the National Consumer Law Center focuses this issue of *Consumer Concerns for Older Americans* on the practices of unscrupulous home improvement contractors.

A Case Study

Mrs. T is an 80-year-old homeowner living on a fixed income. Although money is tight, she takes great pride in her home and garden. Until his death five years ago, Mrs. T's husband handled the majority of the home maintenance.

Last fall, Mrs. T was approached by a friendly contractor who told her that some of her roof shingles looked water-soaked. Since Mrs. T had noticed a small leak in her bedroom, she asked for an estimate. The contractor went up to the roof, pulled off some roof shingles, and put up a tarpaulin. He told Mrs. T that he had found a major leak and that he needed to replace some roof beams as well as the entire roof. When Mrs. T expressed concern about the cost, the contractor told her that he would give her a senior citizen discount price of \$8,000 and arrange for "market rate financing."

The contractor began work the next day and pulled off much of the roof. A few days later, he brought Mrs. T a loan contract from "We Care Finance Company." Mrs. T discovered that the loan was for \$27,500 at 16% interest. When she reminded the contractor that the price was supposed to be \$8,000 financed at a market rate, he told her that the work was more extensive than he had originally thought and that the finance company had imposed some "points and fees" that raised the price of the loan. He claimed that since the work was "half done," she had to sign the loan contract to pay for the work. He threatened to "abandon the

project and put a mechanic's lien on the house." Since winter was coming, Mrs. T panicked and signed the papers presented.

Six months later, the new roof is leaking more than the old one ever did. Mrs. T's floors and walls are damaged. She stopped making loan payments because the work was so bad. "We Care Mortgage" has sent foreclosure papers to the home. An employee of "We Care" told her, "You hired the contractor and we are not responsible. The loan you signed with us is a separate matter. You have to pay us and then sue the contractor for your money."

Deceptive Sales Tactics

Home improvement contractors use several methods of targeting seniors: high-pressure phone calls, flyers, advertisements, and door-to-door sales.

Unscrupulous contractors often employ one or more of the following sales tactics:

- "Bait and Switch" – offering low prices for installed items like windows and home siding, and then telling the senior the item is out of stock and can only be replaced with a high-priced substitute;
- Misrepresenting the urgency of a needed repair;
- Claiming the item is more expensive than advertised because it has to be "custom made" to fit the senior's home;
- Misrepresenting that the consumer is receiving a discount because the home is selected to model the repair when, in reality, the consumer is paying market price or more;
- Misrepresenting the energy savings, health benefits, and value added to the home; and/or
- Misrepresenting the terms on which financing is likely to be arranged.

Deceptive Financing Schemes

Unscrupulous contractors often use deceptive tactics to hide the true cost of paying for the work. These tactics may include:

- Using more than one contract for a single repair in an attempt to confuse the home owner;

- Claiming that there is a "cash" contract that doesn't contain financing terms although the deal is intended to be financed;
- Adding extra hidden charges above the negotiated price;
- Providing expensive (high rate) financing or arranging with a third party to finance the work; and/or
- Obtaining hidden kickbacks from lenders or loan brokers for referrals.

Problems with Contracted Work

In the end, consumers are often left with shoddy work or unfurnished work even though the homeowner has fully paid.

Issues to Consider When Problems Occur

Mortgages and Liens: When a Senior's Home May Be at Stake

Home improvement sales often result in the contractor or a related lender obtaining a mortgage on the consumer's home as part of the credit sale. Even where the contract does not provide for a mortgage, the law generally gives the contractor a right to put a lien against the property. The most common of these liens is called a "mechanic's" lien. In either situation, if the senior refuses to pay because of a dispute, the contractor or lender will probably rely on the lien to try to force the senior to pay and may even try to foreclose. If a lien or a foreclosure is involved, state law regarding liens and foreclosures must be carefully examined.¹ Remedies may be limited if a foreclosure sale occurs.

The Senior's Ability to Cancel a Contract by Giving Written Notice

Canceling a home improvement contract may be the consumer's preferred remedy, particularly where the consumer realizes that the contract is a bad deal, where the seller is slow or never performs, where the work is very shoddy or worthless, or where the seller takes a security interest in the consumer's home. The consumer has a number of alternative bases to cancel the contract.

¹ See generally National Consumer Law Center, *Repossessions and Foreclosures* Ch. 14 and 20 (fourth ed. 1999).

The federal government, through the FTC Cooling-Off Rule, and all states have passed laws designed to protect consumers from unscrupulous door-to-door salespeople.² These laws may allow a senior to cancel a contract within a certain amount of time (usually 3 business days) after a sale in the senior's home by giving written notice to the contractor or lender. These laws usually require that a written notice of these rights and a cancellation form be given to the consumer at the time of sale. If the notice is not given or not given properly, the time to cancel may continue until 3 days after a proper notice has been given. Thus, the senior's opportunity to cancel may remain open. It is, therefore, important to determine at the earliest possible time whether the senior still has a right to cancel the contract.

Another source of consumer cancellation rights is the rescission notice required by the federal Truth in Lending Act (TILA)³ in most transactions where a creditor takes a security interest in the debtor's home.⁴ When applicable, TILA requires a very accurate disclosure of credit terms and requires the contractor to provide a notice of the senior's right to cancel the contract within three business days. This right remains open beyond the three days (but only up to three years) if the notice is not given or is defective. If the contractor violated TILA, the senior may be able to void the lien and reduce any amount owed. The senior may even be entitled to recover money from the contractor or lender as damages.

In 1994, Congress amended TILA by passing the Home Ownership and Equity Protection Act (HOEPA),⁵ which covers certain high cost loans.⁶ For loans that qualify as high cost, HOEPA requires that additional disclosures be given to the consumers. HOEPA also prohibits certain abusive practices. Violations of HOEPA's disclosure provisions may create rescission rights under TILA. HOEPA

² FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. § 429.

³ 15 U.S.C. § 1601 et seq. The FTC Cooling-Off Rule explicitly states that it does not apply in situations where the TILA rescission notice is required. In contrast, state cooling-off statutes do apply, unless they are inconsistent with the TILA requirements.

⁴ The right to rescind under TILA does not apply to purchase money transactions. This means that TILA rescission rights do not apply where a mortgage was created to purchase a home.

⁵ Subtitle B of Title I of the Riegle Community Development and Regulatory Improvement Act of 1994 (H.R. 3474), Pub. L. No. 103-325, 108 Stat. 2160 (Sept. 23, 1994) primarily codified at 15 U.S.C §1639.

⁶ See National Consumer Law Center, Truth in Lending Ch. 10 (fourth ed. 1999).

violations may also trigger TILA monetary damages and enhanced damages for some violations.

A UCC Article 2 rejection or revocation of acceptance is available where the goods in the transaction are defective and the court applies the UCC to that component, even where the transaction is predominantly a service. The consumer can then return the goods and eliminate liability for at least part of the purchase price.

Another ground for canceling a contract is fraud or misrepresentation. If the consumer was misled as to the nature of an agreement, that agreement is not enforceable under basic common law principles.

Warranties

The terms of the contract specifying the work to be done should be closely examined to see whether they contain any provisions that promise a standard of performance, materials or products, specifications, or a guarantee. Any of the above may give the senior a claim for the contractor's breach of warranty.

Even when a contractor does not make any oral or written guarantees regarding work quality, implied warranties apply. Generally, there is an implied warranty that the contractor will complete all work according to the standards of the trade or in a "workmanlike" manner. Part of this standard generally includes the requirement that all work must comply with applicable building codes. Failure to meet these standards could be grounds for the senior to refuse to pay the entire amount. However, if the contractor and lender have no business relationship, the borrower may in some circumstance remain obligated on the loan contract.

Unfair Practices

Every state and the District of Columbia have enacted at least one statute broadly applicable to most consumer transactions aimed at preventing consumer deception and abuse in the marketplace. UDAP statutes may be used to challenge unfair, deceptive, or fraudulent practices. A contractor may have violated the state's UDAP statute by lying about the true nature, benefits or cost of a proposed job during the sales pitch; tricking a senior into signing a completion certificate or signing over the loan check before completion; or lying

about cancellation rights. If any of the above occurred, the senior may have a claim against the contractor or a defense if the contractor is suing the senior.⁷

Third Party Lenders

Most home improvement contracts are financed. Often the contractor arranges for the senior to get a loan through a finance company or a bank. A common home improvement situation is a creditor attempting to collect payments for shoddy or incomplete work. Most home improvement loans state in the note that the holder is subject to all claims and defenses the consumer can raise against the seller. This notice is required by the FTC Holder Rule where the home improvement contractor is the originating lender or refers the consumer to the lender.⁸ Any holder of the note with this notice included is subject to the consumer's claims against the home improvement contractor.

If the notice is not included in the home improvement contract and was not required, the connections between the contractor and the lender must be examined in order to hold the lender liable for the contractor's deceptive practices. Things to look for include:

- Whether there has been an ongoing relationship between the contractor and the lender;
- Frequency with which this lender finances this contractor's work;
- Documents by one party containing the other party's name preprinted into them;
- Knowledge by the lender of previous problems with this contractor's work for other customers;
- Commissions or kickbacks from one party to the other; or
- Ownership of one party by the other.⁹

⁷ For a list of state UDAP statutes, see National Consumer Law Center, *Unfair and Deceptive Acts and Practices App. A* (fourth ed. 1997).

⁸ FTC's Rule Concerning the Preservation of Consumers' Claims and Defenses, 16 C.F.R § 433.

⁹ See National Consumer Law Center, *Unfair and Deceptive Acts and Practices § 6.6* (fourth ed. 1997 and Supp.).

Home Improvement Contractor Litigation Tips¹⁰

- Analyze a complete set of the documents and conduct a thorough client interview.¹¹
- Hire an expert (architect, engineer, local building inspector, reputable contractor, or other private building inspection expert) to look at the work for quality and compliance with specifications. The expert can also provide an estimate regarding the fairness of the price for work completed, the extent of physical damage, and its cost to repair.
- Obtain detailed pictures of the work or damage left by the contractor.
- Try to find former employees of the contractor/lender willing to testify as to its practices.
- Try to find other customers of the contractor who suffered similar problems or who encountered similar sales tactics.

Preventative Counseling for Senior Homeowners

Seniors should take the following basic steps to prevent problems:

- Never deal with any door-to-door contractors. Deal with local tradespeople recommended by friends or reputable building supply stores.
- Before agreeing to hire any home improvement contractor, get at least a second estimate for the same work from another contractor.
- Get references for the contractor and speak to those references. Ask about satisfaction and any problems that arose.
- Take a look at other work performed by the same contractor.
- Get a written contract describing explicit specifications of the work, the price (including details of any financing or credit terms), the responsibility for cleaning up, and the hourly rate for any added work. Ask for guarantees and other promises to be made in writing. Do not agree to final payment until the project is finished.

¹⁰ For more tips, see National Consumer Law Center, Consumer Warranty Law § 16.7.8 (1997).

¹¹ For a sample client interview sheet, see National Consumer Law Center, Consumer Warranty Law Appendix H.2 (1997).

- If the written documents are different from oral promises, do not sign them.
- Remember the 3-day right to cancel that applies to door-to-door sales and home improvement loans even after the papers have been signed.
- Do not allow a contractor to begin work until financial arrangements to pay for the work are complete.
- Never endorse the check over to the contractor before all work is satisfactorily completed. Note: when a creditor finances a home improvement contract, the payment must be made either to the consumer or in a jointly payable instrument.
- Do not consolidate other debts with a home improvement loan.
- If problems with a contractor or home improvement lender arise, get help from a lawyer or housing counselor immediately.

Model Home Improvement Contractor Statute

State regulation of home improvement contractors varies widely. Not surprisingly, most states have significant gaps in their regulatory framework. In order to address the significant and widespread abuses committed against consumers by dishonest home improvement contractors, NCLC, in collaboration with AARP, drafted a model statute regarding home improvement contractors and summarized the state statutes. To order a copy of AARP's Home Improvement Contractors: A Model State Statute, contact AARP at (202) 434-3912. You can also access it on their web at http://research.aarp.org/consume/d16911_contractors.html.

References for Consumers

National Consumer Law Center, *Surviving Debt: A Guide for Consumers* (3rd ed. 1999)

References for Lawyers

National Consumer Law Center, *Consumer Warranty Law* (1997 and Supp.); National Consumer Law Center, *Repossessions and Foreclosures* (fourth ed. 1999); National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (4th ed. 1997 and Supp.); National Consumer Law Center, *The Cost of Credit*

(1995 and Supp.); National Consumer Law Center, Truth in Lending (fourth ed. 1999).

About NCLC

Since 1992, NCLC has received funding from the Administration on Aging to conduct the National Legal Resource Initiative for Financially Distressed Older Americans, intended to improve access to and the quality of consumer representation for older Americans. Founded in 1969, NCLC provides legal advocates with technical and expert assistance, training, and publications that cover all major topics in consumer law. NCLC has established itself as the nation's consumer law specialist, making its legal expertise available to the attorneys for low-income clients. These services are now available to advocates representing older Americans.

Making Use of Consumer Law

Consumer law is a powerful shield but is very complex. In any given transaction, several defenses may exist against creditor or seller claims, but detailed research and calculations are required in order to spot defenses. With financially burdened clients, it is important to recognize that the emotional stress caused by indebtedness can impair decision-making or lead to other difficulties beyond the debt crisis. That recognition can help head off other legal problems that could quickly develop.

NCLC is available to consult with legal advocates for the elderly on a wide range of consumer issues, providing leading and local case law, analyzing contract documents for federal and state law compliance, defining factual and legal issues, identifying experts and legal resources to strengthen cases, and training attorneys in consumer law.